Appendix

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF FILED BY THE UNITED STATES IN UNITED STATES V. BANKERS TRUST CO. (REPORTED SUB NOM. NORMAN V. BALTIMORE & OHIO R. CO., 294 U. S. 240)

(Excerpt, pages 11-16)

Section 240 (a) of the Judicial Code, as amended, hereinbefore quoted, specifically authorizes the issuance of the writ "upon the petition of any party." The use of these words would not be understandable if it were intended that only the losing party were authorized to petition. Furthermore considering that promotion of the public interest by prompt settlement of the questions involved is a prime reason for issuance of certiorari before judgment, under the interpretation of the statute embodied in Rule 39, there is no apparent justification for implying a condition that the writ must be sought by the losing party, whose interest with respect to prompt settlement might be opposed to that of the public.

The history of the statute supports this conclusion. In its original form it was a part of Section 6 of the Circuit Courts of Appeals Act of March 3, 1891, c. 517, 26 Stat. 826. That section provided that judgments or decrees of the Circuit Courts of Appeals in certain classes of cases should be final—

> excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to

it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

It will be observed that in its original form the statute contained no express provision concerning the mode of application for a writ of certiorari. As in the case of certification by the Circuit Court of Appeals (*Louisville, etc., Ry. Co.* v. *Pope*, 74 Fed. 1), it was evidently intended that the writ should issue primarily at the instance of the Court. The purpose of providing for review on certiorari was to supplement certification by giving to the Supreme Court an opportunity, independently of the Circuit Courts of Appeals, to determine that a question merited review by the Supreme Court.[1]

The provisions for a certificate and those for certiorari in the Act of 1891 have been construed *in pari materia*. See *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372, 384-5.

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[1] The House Bill contained a provision for certification by the Circuit Court of Appeals, but not for certiorari at the instance of the Supreme Court, (21 Cong. Rec. 3402). The Senate Bill, as first introduced, provided for certiorari, in addition to certification, in cases "pending before the Cir[cuit] Court of Appeals." This was amended, on motion of Senator Evarts, in charge of the Bill, to read as it was finally enacted. Senator Evarts thus explained the reason for adding review by certiorari in cases made final in the Circuit Courts of Appeals:

"• • • I should deprecate any opinion in advance that these courts [Circuit Courts of Appeals] would not fully meet the interest and confidence that should be invited for them, but still there should be something besides a mere judgment within these courts as to what

The Judicial Code of 1911 and the Judiciary Act of 1925 amended the provisions for certiorari to the Circuit Courts of Appeals. (U. S. C., Title 28, Sec. 347.) In 1911 the words "civil or criminal" and "upon the petition of any party thereto", which appear in the present law, were inserted.

The immediate occasion for amending the statute was to remove the doubt as to the right of the United States to obtain review in criminal cases. *United States* v. *Gulf Refining Co.*, 268 U. S. 542, 544-545; 46 Cong. Rec. 2134. This, however, was not the sole purpose intended to be accomplished, as indicated both by the language employed and by the following statement of the Managers on the Part of the House, annexed to the Conference Report on the Bill (46 Cong. Rec. 4001):

> The effect of this amendment is to make more clear the right of the Supreme Court of the United States by writ of certiorari to bring before it for review any case in which the judgment or decree of the circuit court of appeals is made final by the provisions of the act, and to define more accurately the method by which such writ might be obtained.

In the Judiciary Act of 1925 the phrase "whether Government or other litigant" was added. This amendment did not limit the meaning of the phrase "any party thereto." Its purpose was to place beyond question the right of the United States to petition for certiorari in a criminal case. See the Analysis of the Bill presented by the Committee

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ought to be reviewed in the interest of jurisprudence and uniformity of decision, and that is that the Supreme Court shall have a right, in any of these cases that are thus made final, by certiorari to take up to itself for final determination this or that case, and in that way the scheme of the committee does firmly and peremptorily make a finality on such subjects as we think in their nature admit of finality, and at the same time leaves flexibility, elasticity, and openness for supervision by the Supreme Court" (21 Cong. Rec. 10222.) [Footnote in the original.]

of Justices, in Hearings on S. 2060, 68th Congress, 1st Session, page 13.

The amendments to the Act of 1891 have thus not limited its original scope, but have emphasized the wide latitude of the Court in exercising the power to require cases to be brought before it from the Circuit Courts of Appeals by writ of certiorari. This latitude may be contrasted with the historically limited right of parties to take an appeal. Thus, for example, although an appeal may be taken only from final judgments or decrees, even where the statute does not expressly so require, certiorari may issue to review interlocutory orders or decrees even where the statute contains no such express provision. Compare *Slaker* v. *O'Connor*, 278 U. S. 188, with *Gay* v. *Ruff*, 292 U. S. 25, and cases cited therein. The present case is therefore not governed by the requirements imposed in the case of an appeal. Compare *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 176.

This is not a case of a petition for review by a successful party of a judgment in his favor. There exists an actual controversy, the prompt settlement of which will promote the public interest, within the contemplation of Rule 39. Necessarily it is only in an exceptional case that the public interest warranting certiorari is suggested by a party not aggrieved by an adverse decision. This explains the dearth of precise precedents [2] but does not bear upon the power of the Court.

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[2] In *United States* v. *Fall*, 281 U. S. 757, the Government, after a conviction in the Supreme Court of the District of Columbia, and an appeal by the Defendant to the Court of Appeals, petitioned for certiorari before argument in that court. The petition was denied without comment. The denial can be adequately explained by the probable insufficiency of the reasons advanced for granting the writ. The Government urged that the precarious health of the defendant required, in the interests of justice, a prompt settlement by this Court of the question of his guilt. [Footnote in the original.]

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FILED
MAY 29 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

October Term, 1955

No. 898

SMITH-JOHNSON STEAMSHIP CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner's Supplemental Memorandum

On May 28, 1956, the court below denied respondent's motion for a rehearing in this case. (The order of the court below is appended hereto.) Thus, one of the reasons urged by respondent in opposition to granting certiorari (see respondent's memorandum in opposition, pages 3 and 5) is no longer present.

Respectfully submitted,

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839—17th Street, N. W.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:
GEORGE BRONZ

MAY 29, 1956.

APPENDIX

Order of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

98-55 SMITH-JOHNSON STEAMSHIP CORP.
242-55 MARINE TRANSPORT LINES, INC., AND MARINE NAVIGATION COMPANY, INC.
262-55 PACIFIC FAR EAST LINE, INC.
314-55 BLACK DIAMOND STEAMSHIP CORP.

v.

THE UNITED STATES

Order

These cases come before the court on defendant's motion filed May 2, 1956, for rehearing and clarification of the opinions rendered in these cases on March 6, 1956, together with plaintiffs' responses. Upon consideration thereof,

It Is Ordered this twenty-eighth day of May, 1956, that defendant's motion for rehearing and clarification be and the same is denied.

By the Court
Marvin Jones,
Chief Judge.

(9350-0)

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 898

SMITH-JOHNSON STEAMSHIP CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On June 5, 1956, petitioner's motion for summary judgment on the substantive issues of the case was argued and submitted in the court below. This, we submit, disposes of the basis of the instant petition for a writ of certiorari before final judgment, *viz*, the desirability of settling the issue of jurisdiction prior to the trial on the merits.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JUNE 1956.

388126—56

U. S. GOVERNMENT PRINTING OFFICE: 1956